92-480

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

October Term, 1992

Robert A. Levy,
Phyllis B. Levy,
Robin L. Levy,
Petitioners,

VS.

County of Los Angeles,
City of Los Angeles,
Officer "John Doe" Benjamin,
Officer "John Doe" Mallett,
Kathryn Kvederis, M. D.,
Alan Hanft, M. D.,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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Petitioners pro se

QUESTIONS PRESENTED

1. Whether a State appellate court denies plaintiffs-appellants their right to due process of law under the Fourteenth Amendment when it affirms the dismissal of their case on the basis of evidence initially introduced in defendants-respondents' brief on appeal.

2. Whether a trial court denies plaintiffs their right to due process of law under the Fourteenth Amendment when it grants an ex parte motion to dismiss their case prior to the time permitted by statute.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are petitioners Robert A. Levy, Phyllis B. Levy, and Robin L. Levy, and respondents County of Los Angeles, City of Los Angeles, Officer "John Doe" Benjamin, Officer "John Doe" Mallett, Kathryn Kvederis, M.D., and Alan Hanft, M.D.

Petitioners know of no other entities within the meaning of Supreme Court Rule 29.1 that should be disclosed to enable the Honorable Justices of this Court to evaluate the possibility of recusal.

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OPINION BELOW

The Court of Appeal of California, Second Appellate District, Division 2, issued its unpublished opinion and judgment affirming the dismissal of petitioners' action on 30 March 1992 (A1-A12).

The Court of Appeal issued its Order modifying its Opinion and denying rehearing without changing the judgment on 27 April 1992 (A21-A22).

JURISDICTION

On 24 June 1992, the Supreme Court of California entered its order denying review after judgment by the court of appeal (A23). Pursuant to 28 U.S.C. section 2101(c) and Supreme Court Rule 13.1, the present petition for a writ of certiorari was required to be filed within ninety days of the order of the Supreme Court of California. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES CITED

1. The Fourteenth Amendment to the United States Constitution, section 1:

All persons born or naturalized in the United States,

and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Section 1030, California Code of Civil Procedure, as amended in 1980, paragraphs (a), (b), (c), (d) (A33-A34).

3. Section 1030, California Code of Civil Procedure (prior to 1980 amendment) (A34-A35).

STATEMENT OF THE CASE

The consolidated action arose out of a series of incidents occurring between April 5 and April 20, 1987, whereby petitioner Robin Levy was arrested, incarcerated, induced into entering a plea, and placed in the psychiatric ward of the Los Angeles County - University of Southern California Medical Center. When her parents, petitioners Robert and Phyllis Levy came to pick her up, they were assaulted, arrested, and incarcerated by respondents.

The Opinion of the Court of Appeal incorrectly states the facts of the case. The facts recited by the Opinion (A2-A3; A6-A7) were never properly before any court and were not presented to the trial court, either in the

moving papers or at hearing. The procedural history set forth in the Opinion is also defective because of its omission of pertinent matters.

On December 8, 1989, defendants-respondents filed a 92-page motion for order requiring plaintiffs-petitioners to post an undertaking pursuant to section 1030, California Code of Civil Procedure (CCP). This motion contained numerous unverified factual allegations and was taken off calendar after plaintiffs filed their opposition.

On January 5, 1990, defendants filed a second such motion based on different grounds but containing the same unverified factual allegations, to which plaintiffs objected because of their lack of verification. This motion was denied by the court at hearing on February 2, 1990 (A13).

During the next year plaintiffs and defendants took each others' depositions and engaged in a protracted battle over discovery. Plaintiffs succeeded in serving defendant Kvederis and preventing her dismissal from the case. They also succeeded in consolidating their two cases over the objection of defendants.

Approximately a year after the dismissal of their last motion pursuant to section 1030, on February 6, 1991, defendants- respondents filed their third motion under section 1030 against petitioners. In contrast to their first two such motions, this motion did not even make a pretense of presenting any factual support for its demand. It was based solely on an affidavit of defendants' counsel

giving her opinion that defendants would obtain judgment in their favor (Opinion, A6).

Plaintiffs filed opposition papers pointing out the defective and frivolous nature of defendants' motion and asked for sanctions. At hearing on March 26, 1991, the court appeared to be under the impression that the burden of proof was on the plaintiffs to show how they would prevail (A28). Although respondents' counsel (and the court) mentioned discovery (A26-A27), no results of any discovery were presented. The court granted defendants' motion, ordered the non-resident plaintiffs to post a bond of $50,000 within ten days (A15) [instead of the statutory 30 days plus 10 days for service of the order by mail (A34, A18)], and on April 12, 1991 granted defendants an ex parte motion to dismiss after plaintiffs had returned to their home in Texas (A20).

Plaintiffs appealed and in their Opening Brief pointed out that defendants' motion was "totally bereft of any showing of a reasonable possibility that defendants will obtain a judgment in their favor."

Whereupon defendants-respondents, in their Brief, introduced for the first time a collection of unverified, distorted, often false factual allegations drawn from their motion filed in 1990, which had been denied (A30-A32).

In their Reply Brief petitioners pointed out that they had no notice of the grounds for defendants' motion and that "affirmation of the trial court's decision on the basis

of these allegations would constitute a gross denial to plaintiffs of the most fundamental right of due process under the 14th Amendment of the US Constitution."

Nonetheless, the Court of Appeal affirmed the decision of the trial court, reciting as "facts", the allegations initially introduced in respondents' Brief on appeal (Opinion, A2-A3).

Petitioners' petition for rehearing in the Court of Appeal was denied on April 27, 1992 (A21-A22), as was their petition for review by the Supreme Court of California, on June 24, 1992 (A23).

STAGE WHERE FEDERAL QUESTION WAS RAISED

1. The question of the constitutionality of the initial introduction of factual evidence in an appellate brief by respondents was raised in petitioners' Reply Brief:

> "Respondents' brief contains numerous factual allegations (RB 5-6, 13-14) which were not presented to the trial court, either in the moving papers or at the hearing of their motion, yet said brief concluded that 'based on this record, the trial court properly found that, under section 1030, defendants met their burden of showing a reasonable possibility' of prevailing (RB 14). Plaintiffs had no notice of the grounds for

> defendants' motion and could not dispute such allegations by affidavit or argument. Affirmation of the trial court's decision on the basis of these allegations would constitute a gross denial to plaintiffs of the most fundamental right of due process under the 14th Amendment of the US Constitution. The courts of California have recognized that issues not raised in the trial court cannot be raised for the first time on appeal."

In their petition for review in the Supreme Court of California, petitioners amplified their due process argument (A37).

2. The question of the constitutionality of the premature ex parte dismissal of petitioners' case was initially raised in petitioners' Opening Brief:

> "The trial court erred in allowing plaintiffs only 10 days to post bond. Moreover, it was error for the court to grant defendants a judgment of dismissal prior to the expiration of the required time, and to do so in an ex parte proceeding. These errors constitute a denial of plaintiffs' constitutional due process rights under the Fourteenth Amendment of the U.S. Constitution."

This question was argued again in petitioners' petition for review in the Supreme Court of California (A38-39).

Both of the above questions were passed on without

comment by the California Court of Appeal. In the Supreme Court of California both questions were passed on by the Court's denial of petitioners' petition for review.

ARGUMENT

This petition presents an important question of federal constitutional law. This Court's ruling in the case of *Bell v. Burson*, 402 US 535, 29 L Ed 2d 90, 91 S Ct 1586 (1971) established a standard whereby States must guarantee procedural due process rights under the 14th Amendment to litigants before there may be a taking of their property, such as the posting of a security prior to proceeding with litigation. When a court such as the California Court of Appeal interprets this standard and the statutes adopted pursuant to it wrongly, the effect is to nullify the standard and deny the protection of procedural due process to all litigants. Given the importance of the issue raised in this petition, this Court should intervene by its grant of certiorari and resolve the question. Supreme Court Rule 10.

As enunciated in *Bell v. Burson, supra,* procedural due process requires that a state may not constitutionally require security from a litigant without a determination as to whether or not there is a "reasonable possibility" that his adversary may obtain a judgment in its favor.

The State of California, following this Court's ruling in *Bell v. Burson, supra*, and State court rulings in

Beaudreau v. Superior Court of Los Angeles County, 121 Cal Rptr 585 (1975) and *Gonzales v. Fox*, 137 Cal Rptr 312 (1977), (which followed the rulings of *Bell v. Burson*, supra) repealed or amended several statutes so as to be in compliance with *Bell v. Burson (supra)*. Among these were Government Code sections 947 and 951, and Code of Civil Procedure (CCP) section 1030.

The statute at issue here is CCP section 1030 (A33-A34), which provides for the posting of security by non-resident plaintiffs. Prior to 1980, section 1030 allowed a security to be required of a non-resident plaintiff simply on demand of the defendant (A34-A35). As amended in 1980, the statute actually tracks the language of *Bell v. Burson* in providing that a motion pursuant to section 1030 must show "a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding" (A33) by noticed motion and hearing, with an affidavit setting forth the grounds for his motion. The language of *Bell v Burson, supra*. and the revised section 1030 both make it clear that the burden of showing a reasonable possibility rests on the moving defendant. Such an interpretation has been affirmed by the courts of California, *Shannon v. Sims Service Center Inc.*, 210 Cal Rptr 861, 865 ".....respondent carried its burden of proof of showing...."

When a court such as the California Court of Appeal allows the facts in support of defendant's motion to be introduced, not by affidavit in the trial court, but in respondent's brief on appeal, the effect is to contradict the

standard set forth in *Bell v. Burson, supra.*

The California Court of Appeal, Second District, Division Two, affirmed the ruling of the Superior Court dismissing petitioners' lawsuit. It based its decision on factual allegations initially introduced by respondents in their brief on appeal (A6-A7, A31-A32)), holding that the statement in respondents' notice of motion, that "This motion will be based on ..... all pleadings and papers on file herein" constituted adequate notice to petitioners of the grounds for respondents' motion. (A6 - "The motion also made reference to all the pleadings and papers on file in the case"). This holding constitutes a flagrant violation of petitioners' 14th Amendment due process rights.

As stated in 1901 by this Court in *Simon v. Craft,* 45 L Ed 1165 (1901), "the essential elements of due process are notice and opportunity to defend." It is not enough to go through the motions of providing procedural due process, there must be an actual opportunity on the part of the litigant to present his case, *Kempland v. Regents of University of California*, 202 Cal Rptr 275, 279. Specifically and more recently, as stated by the Supreme Court of Louisiana in *Paillot v. Wooton*, 559 So 2d 758, 761 (La. 1990), "Both state and federal law provide that if one is to be deprived, based on a factual determination, of an interest that is protected, due process requires, at a minimum, oral or written notice of the evidence supporting the proposed deprivation and the opportunity to present a contrary version of the facts." (Emphasis added). See also *Brock v. Roadway Exp., Inc.*, 107 S Ct 1740, 481 US 252,

95 L Ed 2d 239 (1987) (right to be informed not only of nature of charges but also of the substance of the relevant supporting evidence).

These petitioners did not have this opportunity.

None of the purported facts in respondents' "Statement of Relevant Facts" (A30-A32) was contained in their motion or Reply papers filed in Superior Court pursuant to section 1030, nor were they mentioned at the hearing. In fact, respondents presented no facts of any kind. When the court asked defendant's counsel to respond to plaintiffs' statement that they had not presented anything new (A26), her response was simply that, "....enough discovery has developed. So we're entitled to post a bond." The court seemed to agree with this assessment, for the judge then said (A27): "They found out what this case is about, is what happened, Mr. Levy. Through discovery."

The only basis for establishing a "reasonable possibility of obtaining judgment" in their behalf was the affidavit of their counsel giving her opinion that they would win the case, quoted in the courts' opinion (A6). As for the phrase in their motion "all pleadings and papers on file herein", upon which the Opinion relied (A6), it hardly needs to be argued that such a phrase cannot possibly be read as satisfying any requirement of notice. There is obviously no way that an adversary can divine what facts his opponent intends to rely on.

The trial court also appeared to be under the mistaken

impression that it was petitioners' burden to show how they would prevail (A28) and it did not matter whether or not defendants had made a substantial showing; it granted respondents' motion and dismissed the case. On appeal, petitioners pointed out in their brief that respondents motion was "totally bereft of any showing of a reasonable possibility that defendants will obtain a judgment in their favor".

Respondents' Brief did not argue that their presentation in the trial court was sufficient; rather, relying on the clause "all pleadings and papers on file," they proceeded to introduce for the first time a litany of unverified, rejected, and in many instances scurrilous and false statements drawn from their earlier motions that had been denied, contained in their Summary of Relevant Facts (A30-A32), to which petitioners objected in terms of constitutional due process in their Reply Brief. The opinion of the Court of Appeal (A7) ignored petitioners' arguments and affirmed the dismissal of their case based on the purported facts in respondents' brief.

The deprivation of petitioners' due process rights occasioned by the allowance of evidence to be introduced in an appellate brief is aggravated by other aspects of the case. In violation of statutory requirements, petitioners were allowed only ten days to comply with the order to post a bond. Section 1030, together with section 1013, the service-by-mail statute (A9), allows at least 40 days for such compliance.

The issue of the amount of time allowed is not trivial.

The Opinion fastens on the point that appellants gave no indication that they intended to comply with the order for security (A11). But petitioners had another alternative; if they had had time, they could have petitioned for an extraordinary writ (See *Beaudreau v. Superior Court of Los Angeles County*, 14 Cal 3d 448, supra). If the writ were denied, they would still have the opportunity of complying with the order. The court's order did not specify a date certain for compliance, as it did in *Shannon, supra.* Moreover, pursuant to Section 1030(d), the court's order was in fact served by mail on petitioners, on April 2, 1991 (A16-A19, A18), giving them at least until April 22, 1991 (ten days plus ten), enough time to prepare and file a petition for writ of mandate. The surprise dismissal of their case on April 12 denied them this opportunity, to which due process entitled them.[1]

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1. Petitioners were effectively denied any notice of the motion to dismiss their case, which was accomplished ex parte. On April 11, 1991, counsel for respondents telephoned petitioners at their home in Texas that they intended to file, have heard, and obtain a ruling on an ex parte motion to dismiss, the following day in Superior Court in Los Angeles. Petitioners had no opportunity to see the motion or appear at the hearing, which was in fact held on April 12, 1991, at which time their lawsuit was dismissed (A20).

This Court should also be troubled by the policy implications of the California Court of Appeal's ruling. When boiled to its essence, the Court of Appeal's opinion stands for the proposition that a defendant demanding an undertaking from a plaintiff pursuant to statute, may obtain such an order by merely stating his opinion that he will win the case, thereby reverting to the status quo ante *Bell v. Burson*. In the unlikely event that the affected plaintiff appeals, the defendant-respondent can feel free to present his supporting material, however incompetent or false, in his appellate brief, without fear of response. In effect, the principle of reasonable possibility established by *Bell v. Burson (supra)* will have been repealed by the state courts of California.

Upon its grant of certiorari, this Court should reverse the judgment of the Court of Appeal for the simple reason the petitioners were denied the most fundamental Constitutional rights by having had no opportunity to defend against respondents' allegations.

CONCLUSION

Petitioners respectfully request that this petition for a writ of certiorari be granted and that the California Court of Appeal's judgment be reversed.

DATED: 11 September 1992.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION TWO

PHYLLIS LEVY, et al.,	)	B059180
	)	(Super. Ct. No. C673134
Plaintiffs and Appellants	)	consol./w C680221)
	)	Court of Appeal - 2nd Dist
vs.	)	FILED MAR 30, 1992
	)	Joseph A Lane Clerk
COUNTY LOS ANGELES, et al.,	)	
	)	
Defendants and Respondents.	)	NOT TO BE PUBLISHED

Appeal from a judgment of the Superior Court of Los Angeles County. Raymond Cardenas, John W. Dickey, and Stephen O'Neil, Judges. Affirmed.

Robert A. Levy, Phyllis B. Levy and Robin L. Levy, in pro. per., for Plaintiffs and Appellants.

Bonne, Jones, Bridges, Mueller & O'Keefe and Edward C. Wilde; Martin, Stein & Richland, Martin Stein, Timothy T. Coates and Cynthia N. Sarno, for Defendants and Respondents.

Appellants Robert, Phyllis, and Robin Levy appeal

in pro. per. from a judgment entered after the trial court dismissed their complaint against respondents City of Los Angeles, County of Los Angeles, Officer Benjamin, Officer Mallett, Dr. Hanft, and Dr. Kvederis for failure to post an undertaking. They also attempt to appeal from two discovery orders and a postjudgment order denying their motion to tax costs. We affirm.

FACTS

On April 5, 1987, Robin Levy, a 29-year-old aspiring actress also known as Carol Moss, went to her automated teller machine to make a cash deposit. There she made the acquaintance of a man, who then accompanied her to a motel. At the motel, she gave him her ATM card and her code. He left and never returned. Robin then refused to leave the motel and was arrested for trespassing. After spending the night in the county jail, Robin was transferred to the Sybil Brand Institute for Women. On April 14, due to her bizarre behavior, she was sent to Los Angeles County/U.S.C. Medical Center Psychiatric Hospital. Examining physicians established that she spoke rambling nonsense, was depressed, alternatively cried and giggled, was highly suggestible, and unable to care for herself. Consequently, they recommended a 72-hour hold.

Meanwhile, notified by Robin's sister/roommate, Robin's parents, Robert and Phyllis Levy, arrived from Texas to search for Robin. Upon learning of their daughter's confinement, they went to the hospital and insisted that Robin be released to their care. Dr. Hanft

spent at least two hours explaining to them that Robin had to remain for observation because of her unstable behavior, to no avail. Apparently, she had struck out at the staff, had been in restraints earlier, repeatedly disrobed, and had urinated on herself. Dr. Kvederis then told the Levys that while the staff was sympathetic to their concern, their daughter would not be released, and they must leave because it was well after visiting hours. They Levys refused to leave, stating they would have to call security, and that they would sue because security would have to assault them in order to get them off the ward. Security was summoned and, after verbally attempting to get them to leave, physically escorted them off the premises. Apparently, the Levys because physically abusive, resisting the removal of Robin from the room as well as themselves. They Levys were then arrested by Officers Benjamin and Mallet for disturbing the peace and trespassing.

Phyllis and Robert then filed their first complaint against respondents herein, alleging general negligence, intentional tort, premises liability, false imprisonment and personal injury (Levy I).[1] Substituting themselves in pro. per. in Levy I, Robin, Phyllis and Robert then filed a second complaint in pro. per. alleging negligence, assault

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1 Levy I named the County of Los Angeles Sheriff's Department, County of Los Angeles – U.S.C. County General Hospital,Sybil Brand Institute for Women, Officer Benjamin, Officer Mallett, Dr. Hanft and Dr. Kvederis.

and battery, false imprisonment, and conspiracy (Levy II).[2]

Security Pacific's motion in Levy II to require the Levys to file an undertaking pursuant to Code of Civil Procedure section 1030 was granted. They Levys did not comply. A[3] similar motion made by Hollywood La Brea Motel and Ming Chang Tsai in Levy II was granted. Again, they Levys did not comply. Hollywood La Brea Motel and Ming Chang Tsai's motion to dismiss was granted. County of Los Angeles' subsequent demurrer to Levy II was sustained without leave to amend. Levy I and Levy II were then consolidated.

Respondents herein moved for an order requiring the Levys to file an undertaking in the consolidated action. The court granted the motion and ordered the Levys to file an undertaking in the amount of $50,000 within ten days. They Levys failed to comply with the court's order and, on april 12, 1991, the consolidated action was dismissed. All respondents except City of Los Angeles filed a memorandum of costs. They Levy's motion to tax costs

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2. Levy II named the Cityof Los Angeles Police Department, County of Los Angeles Sheriff's Department, County of Los Angeles/U.S.C. County General Hospital, the Sybil Brand Institute for Women, Security Pacific National Bank, Steven Weinstein, Hollywood La Brea Motel and Ming Chang Tsai.

3. Security Pacific subsequently settled.

and/or strike memorandum of costs was denied, as was their motion for reconsideration.

This appeal follows.

ISSUES

Appellants assert that (1) the trial court abused its discretion in dismissing their action pursuant to Code of Civil Procedure section 1030;[4] (2) the trial court erred in quashing the noticed depositions of Drs. Hanft and Swenson, and in finding respondents' objections to interrogatories were untimely; and (3) the trial court erred in denying appellants' motion to tax costs.

DISCUSSION

I. The Trial Court Properly Exercised Its Discretion Under Code of Civil Procedure Section 1030

A. Respondents Made a Showing of Reasonable Possibility That They Would Obtain A Judgment.

Section 1030 sets forth the procedure whereby a plaintiff may be required to post an undertaking. Section 1030(a) states: "When the plaintiff in an action or special proceeding resides out of the state, ... the defendant may at any time apply to the court by noticed motion for an

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4. All further code section references shall be to the Code of Civil Procedure unless otherwise stated.

order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action or special proceeding..." Section 1030, subdivision (b) states: "The motion shall be made on the grounds that the plaintiff resides out of the state or is a foreign corporation and that there is a reasonable possibility that the moving defendant will obtain judgment n the action or special proceeding...."

The court in *Shannon v. Sims Service Center, Inc.* (1985) 164 Cal. App. 3d 907, 914, recognized that reference made in a declaration to the results of an earlier arbitration hearing was sufficient to carry the defendant's burden of proof.

Here, respondents' counsel submitted a declaration stating: "There is more than a reasonable probability that defendants will obtain judgment in the present action on the following grounds: the Complaint, in its entirety, is a frivolous, false, and sham pleading; defendants will prove that defendants owed no duty to any of the plaintiffs; defendants did not engage in any negligent or intentional conduct proximately causing injury; plaintiff was neither falsely imprisoned, nor did defendants conspire in any manner whatsoever with the other named defendants to cause the alleged injuries."

The motion also made reference to all the pleadings and papers on file in the case. A medical report showed that Robin was a seriously disturbed young woman, incidentally arrested for trespassing. The record also

showed that Robert and Phyllis demanded Robin's release from the hospital, refused to leave, told staff they would have to assault the Levys in order to leave, struck out at the staff, and were arrested for trespassing.

We believe that the trial court acted well within its discretion in agreeing with respondents that they had shown a reasonable possibility of obtaining judgment. Indeed, far from shifting the burden of proof to appellants, as they claim, the trial court gave appellants an opportunity to bolster their case by questioning them at the hearing as to how they believed they would prevail. In response to the court's questions, appellant Robert Levy reiterated that (1) as parents, they had a legal right to pick up their daughter; (2) the hospital had no right to arrest them for trespassing; and (3) the hospital had no right to mistreat the Levys. We conclude the court did not abuse its discretion in ordering appellants to file an undertaking.

B. The Trial Court Properly Exercised Its Discretion to Reduce Appellants' Time To File An Undertaking To 10 Days.

Appellants next contend that the trial court erred by reducing the 30-day compliance provision of section 1030 to 10 days, or alternatively, in finding that the defendants made a good cause showing to support such a reduction. Appellants' arguments are without merit.

Section 1030 provides that if a plaintiff is ordered to file an undertaking, he or she must file the undertaking

"not later than 30 days after service of the court's order requiring it or within a greater time allowed by the court" or plaintiff's action shall be dismissed.

First, according to *Shannon v. Sims Service Center*, supra, 164 Cal.App.3d 907, 916, the 30-day provision "is directory, not mandatory, and does not divest the court.... on a good cause showing, to exercise its discretion to reduce the time for compliance." Thus, absent an abuse of discretion, the trial court has authority to reduce the period of compliance.

Second, appellants had twice previously been advised by the court that they were to file undertakings, and twice failed to do so. On October 27, 1988, the court ordered appellants to file an undertaking in the amount of $20,000 to secure Security Pacific's costs. Appellants were ordered to file an undertaking in the amount of $42,500 to secure Hollywood La Brea Motel and Ming Chang Tsai's costs. Respondents' declaration in support of the section 1030 motion before the court stated that "these proceedings have thus far been unnecessarily protracted by plaintiff's recalcitrant conduct in violation of the Court's previous orders. Plaintiffs should be ordered to file an undertaking forthwith in order to secure defendants' costs which have already skyrocketed in light of plaintiffs' conduct to date. Each day that this file must remain open with regard to plaintiffs' frivolous, false and sham complaint causes defendants wholly unnecessary and improper further expenses."

Moreover, there was no evidence that appellants intended to post the undertaking, intended to file a forma pauperis application to be relieved of the undertaking, or requested a continuance to enable them to do either. (*Shannon v. Sims Service Center, supra*, 164 Ca. App.3d 907, 916.)

Under these facts, we believe that respondents made a sufficient showing of good cause to support the trial court's order granting appellants 10 days notice for compliance. No abuse of discretion occurred.

C. Section 1013 Did Not Apply

Appellants contend that section 1013 applied to extend their time for filing the undertaking to April 22, 1991, ten days from April 12, 1991 (which was ten days from service by mail of the notice of ruling). Alternatively, appellants claim that they had until close of business of April 12, 1991 to post their bond. We disagree.

1. Section 1013.

Section 1013 provides that ".... any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of such document served by mail shall be... extended 10 days if the place of address is outside the State of California." Section 1013 has been held to extend

statutory deadlines and time periods initiated or triggered by a notice, document or request which is served by mail; it does not apply where a prescribed time period is commenced by some circumstance, act, or occurrence other than service. (*Citicorp North America, Inc. v. Superior Court* (1989) 213 Cal.App.3d 563, 567.)

However, section 1030, subdivision (d) gives the court discretion to change the compliance period, regardless of service. It states: "plaintiff shall file the undertaking not later than 30 days after service of the court's order requiring it or within a greater time allowed by the court." In *Shannon, supra*, the court held that since there is no statutory prohibition against shortening the compliance period, on a showing of good cause, the court may reduce the time for compliance. (*Shannon v. Sims Service Center, supra*, 164 Cal.App.3d 907, 914.) *Shannon* expressly held that rigid adherence to the 30-day lapse between the service of notice and the compliance date would work an absurdity. (Id. at p. 915.) Thus a 13-day compliance period was affirmed in *Shannon*. Since section 1030, subdivision (a) allows a defendant to notice a motion for an order requiring an undertaking "at any time," the time period commences either 30 days after service or within the time allowed by the court.

Here, the hearing was held on March 26, 1991, at which time actual notice was given to appellants in pro. per. and the court expressly ordered that the "undertaking be filed within ten days," that is, On April 6, 1991. The Minute order was also dated March 26, 1991.

Respondents mailed their notice of ruling on April 2, 1991, On April 11, respondents telephoned appellants and informed them that they would make an ex parte application to dismiss on April 12. That application was granted on April 12. Due to the fact that the court expressly conditioned the prescribed time period to commence by the date of the court's order, rather than service, we find that section 1013 does not apply.

2. Close of Business

Because we find that the court intended the undertaking to be filed 10 days after the date of the hearing, on April 5, we find appellants' argument that they had until the close of business on April 12 to be without merit.

Even were we to interpret section 1030, subdivision (d) as requiring compliance as ten days from the time of service of the notice of ruling, appellants still did not comply nor did they give any indication that they intended to do so.

II. The Discovery Orders Are Not Appealable

Appellants attempt to appeal from an order granting respondents' motion to stay deposition as well as a ruling that resulted in the denial of part of appellants' motion to compel. In light of our ruling affirming the dismissal for failure to post an undertaking, any issues involving discovery are moot. (See *Southern Pacific v. Oppenheimer* (1969) 54 Cal.2d 784, 786.)

III. No Appeal Has Been Taken From the Court's Order Denying Appellants' Motion to Tax Costs.

Appellants attempt to appeal from an August 6, 1991 order denying appellants' motion to tax costs and/or strike memorandum of costs. However, appellants failed to appeal from that order.

" 'If a judgment or order is appealable, an aggrieved party must file a timely appeal or forever lose the opportunity to obtain appellate review.' [Citations.]" (*Norman I. Krug Real Estate Investments, Inc v. Praszker*, (1990) 220 Cal.App.3d 35, 46 emphasis omitted.) A postjudgment order which awards or denies costs is separately appealable, and if no appeal is taken, the appellate court has no jurisdiction to review it. (Ibid)

Here the notice of appeal reveals that appellants did not appeal from the August 6, 1991 postjudgment order denying their motion to tax costs.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

NOTT, J. We concur: GATES, Acting P.J.
MANELLA, J.*

*Assigned by the Chairperson of the Judicial Council.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF LOS ANGELES

DEPT. 82

Date: February 2, 1990

D. Robertson, Dep. Clerk

Honorable William Huss, Judge

G. Williams (E.R.M.)
Reporter

C673134
Phyllis Levy et al.

vs.

County of Los Angeles, et al.

Counsel for Plaintiff:
Robert Levy (x)
Phyllis Levy (x)

Counsel for Defendant:
Bonne, Jones, Bridges,
Mueller & O'Keefe
by: Joan Ruane

NATURE OF PROCEEDINGS.

Motion of defendant, County of Los Angeles, Officer "John Doe" Mallett and Dr. Alan Hanft for order requiring plaintiff to furnish security (CCP Section 1030)

Motion is denied without prejudice

Notice is waived

MINUTES ENTERED

February 2, 1990

COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Dept. 82

Date: March 26, 1991 M. Reinosos, Deputy Clerk

Honorable Stephen E. O'Neil, R. Diggs, E.R.M.
Judge

C 673134 (Parties and Counsel checked if present)

PHYLLIS LEVY, ET AL., Counsel For ROBERT A. LEVY (X)
Plaintiff PHYLLIS LEVY (X),
(BOTH IN PRO PER)

VS

COUNTY OF LOS ANGELES, ET AL., Counsel For Joan M Procopio(X)
Defendant

NATURE OF PROCEEDINGS:
MOTION OF DEFENDANTS, COUNTY OF L.A. OFFICER "JOHN DOE" BENJAMIN, OFFICER "JOHN DOE" MALLETT, ALAN HANFT, M.D., AND KATHRYN A KVEDERIS, M.D., FOR ORDER REQUIRING PLAINTIFFS TO FILE AN UNDERTAKING TO SECURE AN AWARD OF DEFENDANTS COSTS

JOINDER OF MOTION FOR ORDER REQUIRING PLAINTIFF'S TO FILE AN UNDERTAKING TO

SECURE AN AWARD OF DEFENDANTS' COSTS

MOTION TO STAY DEPOSITION

MOTION FOR PROTECTIVE ORDER

Motion and joinder for order requiring undertaking are granted. Plaintiffs to file undertaking in the amount of $50,000.00 pursuant to Code of Civil Procedure section 1030. Undertaking to be filed within ten days.

Motion to stay deposition is granted. Deposition notice is quashed pursuant to Code of Civil Procedure section 2025(t).

Motion for protective order is denied with the exception that if any deposition is video taped, the tape is restricted as to use and dissemination to this case itself and to parties to this case only.

Notice by moving party.

Dept. 82 Judge O'Neil Minutes entered: March 26, 1991

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PHYLLIS LEVY, et al, Plaintiffs, vs. COUNTY OF LOS ANGELES et al., Defendants.	CASE NO. 673 134 (CONSOLIDATED WITH C 680 221) NOTICE OF RULING DATE: March 26, 1991 TIME: 8:30 a.m. DEPT: "82"
ROBIN L. LEVY, et al. Plaintiffs, vs. CITY OF LOS ANGELES, et Defendants.	TRIAL DATE: None MOTION CUT-OFF: None DISCOVERY CUT-OFF: None

TO: ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

Defendants, County of Los Angeles, Officer "John Doe" Benjamin, Officer "John Doe" Mallett, Alan Hanft, M.D. and Kathryn Kvederis, M.D.'s [hereinafter

"Defendants"] Motions to Quash the Depositions of Dr. Swenson and Dr. Hanft, Motion for Protective Order and Motion for Plaintiffs to Undertake a Security came on regularly for hearing in Department "82" of the above entitled Court, the Honorable Stephen O'Neil, Judge Presiding. Joan M. Procopio, Esq. appeared on behalf of Defendants and moving party, Robert Levy and Phyllis Levy appeared on behalf of responding party. There was no appearance by Robin Levy, in Pro Per, or the City Attorney.

After full consideration of the papers and upon oral argument, the Court ruled as follows:

1. Plaintiffs are to undertake a security of $50,000 within ten (10) days;

2. Defendants' Motion to Quash the depositions of Alan Hanft, M.D. and Stanley Swenson, M.D. was granted; and

3. Defendants' Motion for Protective Order was denied; except that in the event that Plaintiffs elect to videotape the depositions, its use and dissemination shall be limited to the parties in this action.

Sanctions requested are denied. Defendants to give notice.

DATED: March 27, 1991

BONNE, JONES, BRIDGES, MUELLER & O'KEEFE
Professional Corporation

By /s/ Joan M. Procoopio
Attorneys for Defendant
COUNTY OF LOS ANGELES
OFFICER "JOHN DOE" BENJAMIN
OFFICER "JOHN DOE" MALLETT
KATHRYN A. KVEDERIS, M.D.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 3699 Wilshire Boulevard, Tenth Floor, Los Angeles, California 90010-2719.

On April 2, 1991, I served the foregoing document described as:

NOTICE OF RULING

on interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED MAILING LIST

BY MAIL As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit. Executed on April 2, 1991, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ KIM ASHBY

MAILING LIST

Robert A. Levy In Pro Per
Phyllis Levy In Pro Per
Robin Levy In Pro Per
1617-D North Mesa Street
El Paso, Texas 79902-3527

William Koepcke, Deputy City Attorney
1700 City Hall East
200 North Main Street
Los Angeles, CA 90012

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PHYLLIS LEVY, et al., Plaintiffs, vs. COUNTY OF LOS ANGELES, et al., Defendants.	CASE NO. 673 134 {CONSOLIDATED WITH C 680 221) ORDER DATE: April 12, 1991 TIME: 1:30 p.m. DEPT: "80"
ROBIN L. LEVY, et al. Plaintiffs vs. CITY OF LOS ANGELES, et al. Defendants.	TRIAL DATE: None set DISCOVERY CUT-OFF: NONE SET ORIGINAL FILED APR 12 1991 COUNTY CLERK

The Ex Parte Application of Defendants COUNTY OF LOS ANGELES, OFFICER "JOHN DOE" BENJAMIN, OFFICER "JOHN DOE" MALLET, ALAN HANFT, M.D., and KATHRYN A. KVEDERIS, M.D. for an Order dismissing Plaintiff Robert Levy, Phyllis Levy and Robin Levy's action Case Number C673 134 (consolidated with Case Number C 680 221) pursuant to C.C.P. Sec. 1030(d) is hereby granted.

DATED: APR 12 1991

JOHN W. DICKEY
JUDGE/COMMISSIONER OF SUPERIOR COURT

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION TWO

PHYLLIS LEVY, et al.,	)	B059180
	)	(Super. Ct. No. C673134
	)	consol./w C680221)
Plaintiffs and Appellants	)	
	)	Court of Appeal - 2nd Dist
	)	FILED APR 27, 1992
vs.	)	ROBERT N. WILSON Clerk
	)	G.L. VILLANUEVA
COUNTY OF LOS ANGELES, et al.,	)	Deputy Clerk
	)	
	)	ORDER MODIFYING
Defendants and Respondents.	)	OPINION AND DENYING
	)	REHEARING

THE COURT:

It is ordered that the opinion filed herein on March 30, 1992, be modified in the following particulars:

1. On page 5, at the end of the first full paragraph, add the following sentence:

Appellants also attempt to appeal the dismissal of Hollywood La Brea Motel and Ming Chang Tsai.

2. On page 12, a new section and footnote are added just prior to the disposition which read as follows:

IV. The Appeal From the Dismissal of Hollywood La Brea Motel and Ming Chang Tsai Must Be Dismissed

Appellants urge that the order of dismissal of their complaint against Hollywood La Brea Motel and Ming Chang Tsai, entered on August 31, 1989, should be reversed. We disagree.

First, appellants filed their notice of appeal well after the expiration of time set forth in California Rules of court, rule 2. Second, although appellants argue that they were misinformed by an employee of the court as to the proper filing time, they have presented no special circumstances that would allow this court to circumvent the jurisdictional impediment to review by treating the matter as a writ petition. (*Mauro B. v Superior Court* (1991) 230 Cal.App.3d 949, 952-953.) Third, appellants have already unsuccessfully petitioned this court for writ of mandate on these facts[5].

Appellants' petition for rehearing is denied. No change in judgment.

(Inititals of three judges) ... .

---

5. We note that appellant also sought to appeal the dismissal of its action against County of Los Angeles in Levy 2. We granted County of Los Angeles's motion to dismiss that portion of the appeal against it, on the grounds that the appeal was untimely, appellants presented no special circumstances allowing us to deal with the matter as a writ petition, and appellants had previously petitioned the court on the same facts for mandate and review.

Second Appellate District, Division Two, No. B059180
S0 26539

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

FILED
June 24 1992
H. CRUZ, Deputy

PHYLLIS LEVY ET Al, Appellants

v.

COUNTY OF LOS ANGELES Et Al., Respondents

Appellants' petition for review DENIED.

/s/ Kennard

Acting Chief Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 82	HON. STEPHEN O'NEIL, JUDGE
PHYLLIS LEVY, et al.,	)
	)
Plaintiffs,	)
	) NO. C673 134
vs.	)
	)
COUNTY OF L.A., et al.,	)
	)
Defendants.	)

TRANSCRIPT OF PROCEEDINGS
March 26, 1991

APPEARANCES:

For plaintiffs/ Responding Party: ROBERT LEVY
PHYLLIS LEVY
In Propria Persona

For Defendants/ Moving Party: BONNE, JONES, BRIDGES MUELLER & O'KEEFE
BY: JOAN M. PROCOPIO
3699 Wilshire Boulevard
10th Floor
Los Angeles, CA 90010-2719
(213) 480-1900

COURTROOM MONITOR: ROXANN DIGGS
TRANSCRIPTION BY: FOX TRANSCRIPTIONS

Page 3, Line 3:

MR. LEVY: I'd like -- to hit the motion for the undertaking first.

THE COURT: All right.

MR. LEVY: First of all, this is a consolidated case; there are two cases, and it's not indicated there's some -- on the -- on the documents. The -- this is their second motion to -- to -- for an undertaking. The first one was --

THE COURT: Oh, I understood that. That was contained within the papers.

MR. LEVY: Right. There's nothing new. They haven't presented anything new in the case. Now, the--- the statute --

THE COURT: In other words, what you're trying to argue is that because there's an undertaking that was required by a judge of you in the other case, I shouldn't do it in this case?

MR. LEVY: No. The -- the undertaking was denied in the lead case, in the -- in 673 134. The undertaking was denied a year ago in the lead case.

THE COURT: All right.

MR. LEVY: And they have not presented anything new

THE COURT: All right.

MR. LEVY: -- to indicate why --

THE COURT: Let's let them -- give them a chance to respond to that.

MS. PROCOPIO: That was taken without prejudice, your Honor. The case was pretty basically pretty new at the time; and over the year, enough discovery has --

THE COURT: Right.

MS. PROCOPIO: -- developed. So we're --

THE COURT: Right

MS. PROCOPIO: -- entitled to post a bond.

THE COURT: Right.

Go ahead.

MR. LEVY: Well, the point is that the -- the statute requires some indication of -- of proof of -- or -- or why they will prevail in the case. Now, since the other motion was denied, the -- the --

THE COURT: They found out what this case is about, is what happened, Mr. Levy.

MR. LEVY: Who found out?

THE COURT: Through discovery.

MR. LEVY: Well, since it was denied, there hasn't really been much in the way of discovery. But anyway, since -- since that was denied, we have consolidated the cases; and if anything, the consolidation of cases increases the likelihood that we are going to prevail.

There are additional issues in the two cases in the -- in the other case that would increase our likelihood of prevailing. They -- have -- they've presented nothing to indicate, and certainly in their motion, there is nothing to indicate why they would prevail.

THE COURT: Well, let me just ask you, forgetting -- is it your daughter that's the primary --

MS PROCOPIO: Robin Levy. She's not here.

THE COURT: Robin?

MR. LEVY: She is in the -- in the --

THE COURT: Is that your daughter?

MR. LEVY: I think in the other case.

THE COURT: All right.

MR. LEVY: Right.

THE COURT: Tell me -- just give me some idea whatsoever howyou two are going to prevail, forgetting Robin for the moment.

MR. LEVY: Well, we were -- we were --
THE COURT: What is your theory?

MR. LEVY: We were victims of assault and battery in the lead case.

THE COURT: Okay, I mean, you certainly have alleged that; but tell me how you're going to prevail, under what theory?

MR. LEVY: Well, there is the claim of assault and battery. We were struck -- we were mistreated by police officers in the -- at the time that we came to pick up our daughter. First of all, we had a right to -- since the cases are consolidated, we --the -- we didn't -- we -- there was a -- we had a legal right to pick up -- they had no right to hold our daughter and -- at -- at the mental ward, because we were her parents coming to pick her up.

So we were the -- the responsible party coming to pick her up. They had no -- they had no right to hold her. They had no right to -- arrest us for trespassing. They had

no right to mistreat us, to strike us, to -- they -- they broke my wife's rib. They -- they tossed my --

THE COURT: Okay

MR. LEVY: -- daughter against the wall. They --

THE COURT: All right.

MR. LEVY: -- the whole bit.

THE COURT: Okay.

Go ahead.

MS. PROCOPIO: Your Honor, all I have to do is show reasonable possibility of success on the merits. I think I've showed that in my papers.

THE COURT: I agree. I agree.

Also, they are residents of El Paso, Texas, and there's a reasonable possibility -- and I'm going to give you just a very brief chance, and this is primarily out of a courtesy, because you came so far with respect to this motion. For example, your opposition to the motion to quash and the motion for protective order were filed late. Pursuant to the rules, you're not even entitled to appear and/or argue those motions.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

PHYLLIS LEVY, et al.,
Plaintiffs and Appellants,

vs.

COUNTY OF LOS ANGELES, et al.,
Defendants and Respondents

Appeal from the Superior Court of Los Angeles County
Honorable Raymond Cardenas, Judge
Honorable John W. Dickey, Judge
Honorable Stephen O'Neil, Judge

RESPONDENTS' BRIEF

BONNE, JONES, BRIDGES, MUELLER 7 O'KEEFE
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GREINES, MARTIN STEIN 7 RICHLAND
MARTIN STEIN
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9601 Wilshire Boulevard, Suite 544
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Attorneyf for Defendants and Respondents 1County of Los Angeles, Officer "John Doe" Benjjamin, Officer "John Doe" Mallett, Alan Hanft, M.D., and Kathryn Kvederis, M.D.

STATEMENT OF RELEVANT FACTS

The facts underlying this action read like a bad French farce. On the morning of April 5, 1987, plaintiff Robin Levy, aka Carol Moss, met a man at the automatic teller machine at her bank, former defendant Security Pacific National Bank, and went to a motel with him. (Appellants' Appendix in Lieu of Clerk's Transcript ("App.") at 88, 208.) Robin remained at the motel and gave her new acquaintance her automatic teller card to obtain some money. (Id.) Not too surprisingly, he never came back.

Distraught, Robin refused to leave the motel. Management called the police, and Robin was arrested for trespassing (App. at 5, 17.) After spending the night in the county jail, Robin was transferred to the Sybil Brand Institute for Women. Due to her bizarre behavior, Robin was placed on a 72-hour detention for psychological evaluation and treatment at the Los Angeles County/USC Medical Center Psychiatric Hospital. (App. at 21-23.)

Upon learning of their daughter's confinement, plaintiffs Phyllis and Robert Levy came to the psychiatric hospital and insisted on taking Robin home. (App at 25-26.) Although the staff spent hours explaining to the Levys why Robin had to remain for observation, e.g., she had been placed in restraints earlier in the day, the Levys refused to leave without their daughter. (App. at 25.) Defendant Dr. Kvederis told the Levys that it was after

visiting hours, that they must leave and that if they did not leave, she would have to call security. (App. at 25, 32.)

The Levys became loud and hostile and told Dr. Kvederis to go ahead and call security. The Levys stated, however, that security would have to drag them out and assault them and that they would sue for assault. (Id.) Security was summoned and again attempted to verbally convince the Levys to leave. They then attempted to escort the Levys out. The Levys began screaming and trying to prevent the staff from removing them. (App. at 25-26.) The levys were ultimately removed from the hospital and arrested for disturbing the peace and trespassing. (App. at 28, 30-38.)

If is this farcical series of incidents that gave rise to the two actions underlying this appeal.

Section 1030, California Code of Civil Procedure, as amended in 1980:

Security for costs and attorney's fees; motion; hearing; undertaking.

(a) When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, the defendant may at any time apply to the court by noticed notion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action or special proceeding. For the purposes of this section, "attorney's fees" means reasonable attorney's fees a party may be authorized to recover by a statute apart from this section or by contract.

(b) The motion shall be made on the grounds that the plaintiff resides out of the state or is a foreign corporation and that there is a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding. The motion shall be accompanied by an affidavit in support of the grounds for the motion and by a memorandum of points and authorities. The affidavit shall set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects of incur by the conclusion of the action or special proceeding.

(c) If the court, after hearing, determines that the grounds for the motion have been established, the court shall order that the plaintiff file the undertaking in an

amount specified in the court's order as security for costs and attorney's fees.

(d) The plaintiff shall file the undertaking not later than 30 days after service of the court's order requiring it or within a greater time allowed by the court. If the plaintiff fails to file the undertaking within the time allowed, the plaintiff'saction or special proceeding shall be dismissed as to the defendant in whose favor the order requiring the undertaking was made.

Sections (e), (f), and (g) omitted.

Section 1030, California Code of Civil Procedure (prior to 1980 amendment):

Security for costs; plaintiff a nonresident or foreign corporation.

When the plaintiff in an action or special proceeding resides out of the State, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action or special proceedings must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, or with the judge if there be no clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars ($300). A new or an additional

undertaking maybe ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceeding stayed until such new or additional undertaking is executed and filed. Any stay of proceedings granted under the provisions of this section shall extend to a period 10 days after service upon the defendant of written notice of the filing of the required undertaking.

After the lapse of 30 days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge, may order the action or special proceeding to be dismissed.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
No. S026539

PHYLLIS LEVY, et al.,
Plaintiffs - Appellants,

vs.

COUNTY OF LOS ANGELES et al.,
Defendants-Respondents.

PETITION FOR REVIEW

After Decision, Dated March 30, 1992, of the Court of Appeal for the Second Appellate District, Division Two
No. B059180

On Appeal from the Judgment of the Superior Court of the State of California, Los Angeles County - No. C673134
Consolidated with Case No. C680221
The Honorable Raymond Cardenas, Judge
The Honorable John W. Dickey, Judge
The Honorable Stephen O'Neil, Judge

Robert A. Levy
Phyllis B. Levy
Robin L. Levy
1517-D N. Mesa Street, El Paso, TX 79902-3527
Phone: (915) 533-6413
Plaintiffs-Appellants - In pro per

1. DUE PROCESS OF LAW

"The essential elements of due process are notice and opportunity to defend," *Simon v. Craft*, 45 L Ed 1165 (1901). Both of these elements were denied to appellants in the trial court. By failing to introduce the factual basis for their motion, respondents prevented appellants from defending against it..

Due process of law is guaranteed by both the California (Article 1, Section 7) and United States (Amendment 14, Section1) constitutions, *Motores de Mexicano, S.S. v Superior Court in and for Los Angeles County*, 331 P 2d 1 (1958): Constitutional guarantee of due process guarantees that any person against whom a claim is asserted in a judicial proceeding shall have opportunity to be heard and present his defenses. Moreover, such guarantees imply more than merely "going through the motions" of a hearing, *Kempland v. Regents of University of California*, 202 Cal Rptr 275. Furthermore, as stated in *Cox v. Armour Fertilizer Works*, 59 L Ed 1027, 1028 (1915), "to one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of lawwould have led to the same result because he had no adequate defense upon the merits."

1. DUE PROCESS

The court's order allowing plaintiffs only ten days to comply amounted to a denial of their constitutional due process rights in that 1) there was inadequate time to comply or respond, 2) there was an ambiguity as to how long they actually had, 3) it amounted to a denial of equal protection of the law, and 4) the purpose of allowing only ten days was to get the case dismissed.

1) The legislature prescribed a period of 30 days for a plaintiff to comply. These plaintiffs traveled to Los Angeles to appear at hearing on March 26, 1991. They had to return to their home in Texas after the hearing. Allowing them only until April 6, 1991 to come up with an undertaking of $50,000 to be filed in Los Angeles is unreasonable from any standpoint.

2) At hearing the court said (with respect to the undertaking), "That shall be done within ten days." (App 412, lines 3- 4). The court went on to say (to respondents' attorney),"Now, I'll ask you to prepare a notice, and that will be the order of the court." (App 412, lines 26-27).

Since notice was not waived, and since appellants were served by mail in Texas with a Notice of Ruling on April 2, 1991 (App 395-397), they had no reason not to believe that they had until April 22, 1991, to act.

3) Since the statute allows 30 days to comply, the allowance of only 10 days for no specific reason amounts to a violation of their right to equal protection of the laws, U.S. Constitution, Amend. 14, since other plaintiffs are allowed 30 days.

4) Respondents' avowed purpose in demanding a ten-day period for response was simply to get the lawsuit dismissed. As stated in their Declaration, after having demanded that appellants be made to file an undertaking "forthwith", their counsel added, "Each day that this file must remain open...." (Emphasis added) (App 240). It should be noted that their motion was filed right after appellants had consolidated their cases (App 229-233) and were preparing to begin discovery in the consolidated action (App 289-291) after the end of the court-imposed moratorium (App 195).

The imposition of said ten-day period was thus a gross violation of their constitutional due process and equal protection rights.